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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1960.

No. 491

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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Statutes Involved.

Federal Employer's Liability Act, Act of April 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; U. S. C. A., Title 45, Sec. 51; Apr. 22, 1908, c. 149, § 2, 35 Stat. 65; U. S. C. A., Title 45, Sec. 52; Apr. 22, 1908, c. 149, § 3, 35 Stat. 66; U. S. C. A., Title 45, Sec. 53 2

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To the United States Court of Appeals for the Eighth Circuit.

Chicago, Rock Island and Pacific Railroad Company (herein referred to as "Rock Island") respectfully prays that this Court grant certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit, which affirmed a judgment of the United States District Court for the Northern District of Iowa against petitioner, in favor of respondent, Chicago and Northwestern Railway Company (herein referred to as "Northwestern"), in the

amount of thirty-five thousand dollars, with interest and costs, in a suit for indemnity, or in the alternative for contribution, growing out of a personal injury sustained by one of respondent's employees.

The opinion of the Court of Appeals is reported at 282 F. (2d) 110. It is printed in Appendix "A" hereto. The judgment of that Court is printed as Appendix A-1 hereto. The findings of fact, conclusions of law, opinion and judgment of the District Court are reported at 179 F. Supp. 33-63, and are printed in Appendix "B" hereto.

GROUNDS UPON WHICH JURISDICTION IS INVOKED.

(i) The judgment to be reviewed was entered in the United States Court of Appeals for the Eighth Circuit on August 10, 1960, pursuant to the opinion of the Court filed on that date.

(ii) No petition for rehearing was filed and no order has been sought to extend the time for filing petition for writ of certiorari.

(iii) Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by the Act of June 25, 1948, 62 Stat. 923, U. S. C. A., Title 28, Sec. 1254.

The Court of Appeals for the Eighth Circuit held certain contracts between all major railroads relating to interchange of cars, applicable throughout the United States, do not render a receiving line solely responsible for injuries to its employees resulting from the condition of the cars received. A judgment for contribution in favor of the receiving railroad against the delivering line for contribution was sustained. This question has never been presented to, or decided by a Court of last resort. A final decision of such question is of great importance to the entire railroad industry of the nation.

The court below also held a receiving line which has accepted a car, and has paid damages to its employee, injured by Safety Appliance Act defects therein, entitled to contribution from the delivering line. This was on the theory that a "common liability" to the injured party existed, although one railroad was liable under the Safety Appliance Act and the other, if liable at all, was made so by its common law negligence. This is of the utmost importance to the railroad industry because fifty per cent of the states now permit contribution between joint tfeasors, when there is a common liability to the injured person.

The courts below, we believe, have not properly construed or applied the Federal Safety Appliance Act upon facts which will frequently recur. These questions require final determination by this Court.

QUESTIONS PRESENTED FOR REVIEW.

For about one hundred years the problems arising incident to the movement and interchange of freight cars over two or more lines of railroad have been governed by codes of rules, to which the major rail lines have been parties. One of these codes is known as the Code of Car Service Rules. This governs the delivery and acceptance of cars between railroads, use of cars by other than the owner line, loading and routing of cars, and rental for use of freight cars, commonly called "per diem" charges. Another code is the Code of Interchange Rules relating to transfer of loaded and empty cars between railroads, necessary repairs to cars while in transit, and other incidental duties and obligations.

The trial court found as a fact, upon supporting evidence, that Rock Island had delivered one of its boxcars, loaded with agricultural implements, to Northwestern at Goldfield, Iowa, and Northwestern had accepted such de-

livery. While the car was being pulled from an interchange, or transfer, track between the two rail lines by a Northwestern locomotive and crew, to be put into a Northwestern train, Kleppe, a Northwestern brakeman, while attempting to release a handbrake which had been set by a Rock Island crew member when the car was set on the transfer track, fell from the top of the boxcar when the brake handle came off. Kleppe sustained serious permanent injuries. Northwestern tendered defense, or settlement, of Kleppe's injury claim to Rock Island, which denied responsibility. Before suit Northwestern paid Kleppe seventy thousand dollars and, in this action, sought indemnity against Rock Island for that amount, or, in the alternative, contribution of one-half.

Question No. 1. The first question is whether the rules as construed and applied for many years by the railroads, including the parties to this action, bar rights of indemnity or contribution against the delivering line, for injuries to employees of a receiving line of railroad which has been held liable.

The trial court ruled that the codes "do not operate as a waiver of, or bar to, any claim for indemnity or contribution which Northwestern might have," and that uncontroverted evidence of the customs and practices adopted and followed by the railroads over many years, established only that "many railroads have observed the protocol of not making claims against other railroads of the nature here involved." The Court of Appeals affirmed, saying that the codes were "solely designed to govern the care and maintenance of cars belonging to one carrier while in the possession of another."

Question No. 2. The trial court concluded, since the car had been delivered to Northwestern, and accepted by it before Kleppe's injury, it was not then in use on the line

of the Rock Island, but was actually being hauled on the line of Northwestern. Therefore, Northwestern violated the Safety Appliance Act but Rock Island did not, and no "common liability" to Kleppe was shown under the Federal Employer's Liability or Safety Appliance Acts. (A "common liability" is a prerequisite to any right of contribution under Iowa law.)

Notwithstanding that the federal statutes completely superseded the Iowa common law, and governed Northwestern's liability to Kleppe, the court said the two railroads were under a common law obligation to Kleppe to adequately inspect the car, and any failure in this respect supplied the "common liability" for negligence required by Iowa law. Indemnity was denied but contribution of one-half was granted.

The Court of Appeals, while affirming the judgment of the District Court, did not follow its reasoning. It said that, although Northwestern's liability to Kleppe was absolute under the Safety Appliance Act, his claim against Northwestern could only be enforced by an action under the Federal Employer's Liability Act, which imposed liability for negligence and, therefore, the requirement of a common liability was present.

Question No. 2 may be stated as follows: Do the Federal Employer's Liability and Safety Appliance Acts supersede and wipe out the common law tort liability of a railroad company to one of its employees, who sustains an injury while using a defective safety appliance?

Stated in another way the question is, whether the statutory absolute liability imposed by the Safety Appliance Act is a liability "in common" with liability for negligence under state law?

The foregoing novel and important questions are presented by this petition. In view of the daily interchange